



## MEMORANDUM

**TO:** The Pennsylvania House of Representatives

**FROM:** Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

**DATE:** November 12, 2021

**RE: OPPOSITION TO HB 1590 P.N. 1747 (Stephens)**

**Bill summary:** [HB 1590](#) (P.N. 1747) would amend [42 Pa.C.S. § 9721\(b\)](#) to create presumptive guidelines within the [PA Sentencing Guidelines](#)<sup>1</sup> when a gun is possessed during a crime of violence or drug offense or when a person is prohibited from possessing a gun. Gun-related offenses are already widely covered in the Crimes Code as are deadly weapon enhancements in the Sentencing Guidelines.<sup>2</sup> What Pennsylvania does not need is another mandatory scheme for penalizing offenses that are exhaustively addressed under the current guidelines and statute, further contributing to mass incarceration while exacerbating the racial and economic disparities within our criminal legal system.

**On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose House Bill 1590.**

### **HB 1590 would create presumptive mandatory minimums.**

- “Presumptive guidelines” would effectively establish mandatory minimums within the PA Sentencing Guidelines for individuals who have been previously convicted of certain offenses.
- HB 1590 would restrict courts from imposing sentences below the Pennsylvania Commission on Sentencing’s guidelines by requiring “at a minimum five years or [the recommended guideline sentencing range], whichever is less” for three categories of offenses:
  - Crimes of violence when a firearm was possessed during the commission of the offense. [42 § 9714](#).
  - Persons not to possess, use, manufacture, control, sell or transfer firearms, if the person has previously been convicted under the enumerated offenses section. [18 § 6105](#).
  - Possession with intent to deliver in instances where a firearm was possessed. [35 § 780-113\(a\)](#).
  - HB 1590 would also apply to attempt, solicitation, and conspiracy to commit the above offenses.
- HB 1590 would prohibit courts from going below the mitigated range of the guidelines if someone was previously convicted of an offense **punishable** by a term of imprisonment exceeding two years. (pg. 3, lines 28-30).
  - It is unclear whether this could be interpreted as not having been **sentenced** to two years of imprisonment, but simply being **convicted** of any offense—firearm-involved or not—where it was legally possible to have a sentence of greater than two years.
- Using “punishable” as the standard would render HB 1590 applicable to a much broader range of offenses than those intended for the purpose of “holding violent criminals who use guns accountable.”<sup>3</sup>
  - It is not explicitly clear whether this portion of the statute (b.2) applies to the three categories of offenses mentioned in (b.1) of the proposal or to all offenses in the PA Criminal Code, since (b.2) and (b.1) are both subsections, logically on the same level in the statutory scheme.

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<sup>1</sup> [204 Pa. Code § 303](#).

<sup>2</sup> [204 Pa. Code § 303.17\(a\), \(b\)](#).

<sup>3</sup> Rep. Todd Stephens. Co-sponsorship memorandum: [Holding Violent Criminals Who Use Guns Accountable](#), April 8, 2021.

- HB 1590 proposes minimum incarceration requirements without statistical evidence that minimum sentences are an effective mechanism to improve public safety, deter crime, reduce recidivism or save taxpayers money.

### Like all minimum sentencing schemes, HB 1590 would limit judicial discretion.

- HB 1590 would usurp authority from the judiciary by mandating that the sentencing judge impose minimum sentences for certain categories of offenses where a firearm was “possessed” during the commission of the crime.
- HB 1590 only permits judges to sentence someone below the guidelines if there is a “substantial and compelling” reason to do so. But judges are already permitted to depart from the guidelines if they can make a compelling statement as to why they departed. Deviation from the guidelines rarely occurs—judges sentence within the guidelines 91% of the time.<sup>4</sup>
- HB 1590 establishes that “the court *may not* impose a sentence of less than the shortest sentence within the mitigated range of the guidelines in the “7th Edition of the Sentencing Guidelines, as amended until the effective date of this subsection, and taking effect under section 2155, or four years, whichever is lower...” (pg. 3, lines 20-27) if certain circumstances occurred prior or during the commission of the crime. These circumstances include (1) the person was previously convicted of an offense punishable by a term of imprisonment exceeding two years; (2) the offense resulted in death or serious bodily injury; (3) violence or credible threats of violence, or induced another person to do so during the commission of the offense; (4) the person possessed a deadly weapon or induced another person to do so, during the commission of the offense.
  - Although the mitigated range is below the standard sentence recommendation, the bill still creates a mandatory minimum sentence by requiring judges to sentence within a specific range without the ability to depart from the guidelines.
  - The guidelines already include deadly weapon enhancements.<sup>5</sup> It is unclear whether HB 1590 would direct judges to base the “standard range” on the **enhanced** matrix when sentencing defendants.
  - It is unclear whether this prohibits courts from sentencing lower than the guidelines, even if the guidelines change to recommend lower sentences, as long as HB 1590 is in effect and the situations in (b.2)(2)(i)-(iv) apply.
  - Further, this provision seems to apply to persons with a previous criminal history or those alleged to have used verbal threats or violence in the commission of their alleged crime, casting a wide net, outside of previous offenses relating to a firearm. (pg. 3, lines 28-30; pg. 4, lines 1-8).
- HB 1590 may prohibit judges from imposing sentences that involve alternatives to incarceration, such as diversion programs or even probation.

### HB 1590 fails to define critical terms in relation to the new provisions it introduces.

- HB 1590 does not define “**possessed**” as it relates to a firearm. This leaves room for courts to interpret the statute broadly. The statute does not clarify instances, for example, where an individual is charged with possession with intent to deliver, arrested in a home or vehicle, and then a firearm subsequently being recovered in that home or vehicle—but where the firearm has nothing to do with the commission of the offense.
- HB 1590 also does not define what a “**substantial and compelling reason**” is. (pg. 3, lines 15-19). Courts appear to have room to interpret substantial and compelling as a high bar because of the use of and instead of substantial or compelling.

**For these reasons, we urge you to oppose House Bill 1590.**

<sup>4</sup> Pennsylvania Commission on Sentencing, [2019 Annual Report](#), p. 89.

<sup>5</sup> [204 Pa. Code §303.17\(a\)](#) and [§303.17\(b\)](#).